Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term 2000

HECTOR A CUELLAR, A.K.A.
FRED CUELLAR,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To
THE COURT OF APPEALS FOR
THE FIRST DISTRICT OF TEXAS
CAUSE NO. 01-98-00572-CR

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment allows a person to be convicted of violating a statute which has been repealed?

TABLE OF CONTENTS

ISSUE PRESENTED i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES
- Cases iii
- Statutes and Rules iii

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR REVIEW 4

CONCLUSION 8

APPENDIX A 1a

INDEX OF AUTHORITIES

Cases **Page**

Calder v. Bull,
3 U.S, (3 Dall.) 386(1789) 7

Cuellar v. State, No. 01-98-00572-CR
(Tex. App.-Houston {1*Dist.] September
2, 1999) (unpublished) 1

Dickens v. State
981 S.W.2d 186 (Tex.Crim.App. 1998) 5

Statutes and Rules

Act of May 17, 1991
72nd Leg. R.S. ch.565 5

Act of May 29, 1993
73rd Legis. R.S. ch.900 2

SUP. CT. R. 12 3

Tex Const. art. V, § 5 5

Tex. Pen. Code Ann. § 31.03 (Vernon 1994) 3, 6

Tex. Pen. Code Ann. § 31.09 (Vernon 1994) 3, 5

Tex. Pen. Code Ann. § 31.09 (Vernon Supp. 1991 5

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW HECTOR A. CUELLAR, Petitioner herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and pursuant to SUP. CT. R. 12, files this Petition for Writ of Certiorari and in support thereof, would show the Court as follows:

I. STATEMENT OF JURISDICTION

This is a writ of certiorari following denial of review by the Texas Court of Criminal Appeals.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

Petitioner was convicted of theft of more than $200,000 in the 338th Judicial District Court of Harris County, Texas, in Cause No. 743694. The jury assessed his punishment at 10 years incarceration, probated, and a $10,000 fine. The trial court also ordered restitution in the amount of $1,075,100. Cuellar filed a timely notice of appeal.

The Court of Appeals for the First District of Texas affirmed the judgment of the trial court in an unpublished opinion issued on September 2, 1999. *Cuellar v. State*, No. 01-98-00572-CR (Tex. App. - Houston [1st Dis.] September 2, 1999) (unpublished). A copy of the Court of Appeals' opinion is attached hereto as Appendix A.

Cuellar filed a timely petition for discretionary review with the Court of Criminal Appeals. The Court of Criminal Appeals denied review on April 26, 2000.

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[1]The Texas Court of Criminal Appeals is the highest court in Texas with criminal jurisdiction. TEX. Const. art. V. § 5.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of his life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of May 17, 1991, 72nd Leg. R.S. ch. 565 § 12(a)

The changes in law made by Sections 1 through 5 and 7, 9 and 10 of this Act apply only to an offense committed on or after the effective date of this Act. For the purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

Act of May 29, 1993, 73rd Legis. R.S. ch 900, § 1.18

(a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Act of May 19, 1993, 73rd Legis. R.S. ch. 900, § 1.19

(a) Except as provided by Subsection (b) of this section, this article takes effect on September 1, 1994.

(b) The repeal of Section 12.422, Penal Code, as provided by Section 1.01 of this article, Section 16.02(i), Penal Code, as added by Section 1.01 of this article, and Sections 1.02, 1.06 and 1.16 of this article take effect September 1, 1993.

III. STATEMENT OF THE CASE

Petitioner was charged with theft of more than $200,000 pursuant to TEX. PEN. CODE ANN §§ 31.03 and 31.09 (Vernon 1994). The indictment alleged a series of 10 thefts in 1991 and an additional 104 in 1995. Slip op. at 3-4.

At the close of the State's case, it abandoned all of the 1991 allegations. After the trial court denied Cuellar's motion for instructed verdict of acquittal, the case went to the jury and Cuellar was convicted of more than $200,000. The jury then sentenced him to 10 years incarceration, probated, and fined him $10,000.

On appeal, Cuellar alleged that the evidence was legally insufficient in that the indictment charged him with a violation of the 1973 Texas Penal Code, which was continued in force by virtue of "savings clauses" in two subsequent statutes, and that when the 1991 allegations were dismissed, the State failed to prove him guilty of the crime with which he was charged, that is violation of the 1973 Texas Penal Code.

The Court of Appeals in its opinion held that the elements of the offense of theft in the 1973 Penal Code was the same as those in the 1994 Penal Code and that the only difference was the punishment range. Slip op. at 6. It also held that Cuellar was sentenced within the statutory punishment

range under either statute. The Court went on to hold that Cuellar has failed to show how the evidence was insufficient based simply on the change of punishment. *Id.*

The Court of Criminal Appeals denied review without comment.

IV. REASONS FOR REVIEW

> Whether the Due Process Clause of the Fourteenth Amendment allows a person to be convicted of violating a statute which has been repealed?

The issue presented in this petition turns on the application of Texas law, changes in that law and the effect of "savings clauses" which keep repealed statutes in effect for offenses committed before the effective date of the replacement statutes.

The issue presented here was first presented to the Court of Appeals for the First District of Texas, which did not deal directly with the issue, and the Court of Criminal Appeals, which refused discretionary review.

The indictment alleged a theft pursuant to "one scheme or continuing course of conduct" by aggregating 10 transactions in July 1991 with 104 transactions in 1995. (C. R. I-3-8).[2]

At the close of the evidence, Appellant moved for an instructed verdict on the 1991 transactions. The prosecutor

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[2] C.R. refers to the clerks record, the papers in the case. The Roman numeral is the volume number and the Arabic number is the page or pages. Thus, C.R. 1-3-8 is Volume I, pages 3-8 of the clerk's record.

argued in opposition that the transactions alleged in an aggregated theft indictment are not severable. (R. R, IX-10).[3] Immediately after the trial court denied an instructed verdict, the prosecutor moved to "excise" the 1991 transactions from the court's charge. (R.R.XI-12-13). Appellant moved for a mistrial on the ground that the State had alleged those transactions in the indictment as a device to elicit otherwise inadmissible evidence before the jury. (R.R. XI-13-14). The trial court allowed the abandonment and denied the motion for mistrial. (R.R. XI-13-14). The court's charge included no transactions which occurred before March 3, 1995. (C.R. I-175-81)

Because the first transaction set out in the indictment allegedly occurred on July 1, 1991, the indictment charged the offense of aggregated theft pursuant to TEX. PENAL CODE ANN.§ 31.09 (Vernon Supp. 1991), part of the 1973 Texas Penal Code. *Dickens v. State*, 981 S.W.2d 186 (Tex. Crim. App.1998) (1973 Penal Code governs prosecution for aggregated theft if any element of the offense was committed before September 1, 1994). On July 1, 1991, the highest grade of theft under Texas law was a second-degree felony. Theft of more than $100,000 became a first-degree felony on September 1, 1991. Act of May 17, 1991, 72nd Leg. R.S. ch. 565 § 1, Chapter 565 contained a savings clause in § 12(a) which provided that the amendment applied only to offenses committed after September 1, 1991; the prior law remained in effect if any element of the offense was committed before that date.

Theft of more than $200,000 became a first-degree felony when the 1994 Penal Code became effective on September 1, 1994, Act of May 29, 1993, 73rd Legis. R.S., ch.

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[3] R. R. refers to the court reporter's record or transcript. The Roman numeral designates the volume number and the Arabic Number, the page. Thus, R. R. IX-10, is volume IX, page 10 of the transcript.

900, art. 1, § 1.01, § 31.03(e)(7). However, Chapter 900 contained a savings clause which provided that the prior law remained in effect if any element was committed before September 1, 1994. *Id.*, § 1.18. The State purported to prosecute Appellant for a violation of the first-degree theft statute contained in the 1994 Penal Code.

Because the indictment alleged that Appellant violated the 1973 Texas Penal Code, the State bore the burden of proving that he violated that repealed statute which remained in effect only due to the savings clause. The trial court's charge did not authorize his conviction for a violation of the theft statute in effect in July 1991, nor did the jury find that he engaged in conduct which violated that statute. Once the State abandoned the 1991 transactions, prosecution under the law in effect in July 1991 was not permissible under the savings clause in the 1994 Penal Code.

Because the indictment alleged that Appellant violated the 1973 Texas Penal Code, the State had to prove that an element of the offense occurred while the 1973 Penal Code was in effect. The trial court's charge did not authorize his conviction for a violation of the theft statute in effect in July 1991, nor did the jury find that he engaged in conduct which violated that statute. Once the State abandoned the 1991 transactions, prosecution under the law in effect in July 1991 was not permissible under the savings clause in the 1994 Penal Code.

It follows directly that Petitioner was convicted of violating a repealed statute. The State failed to submit to the jury any allegation that Petitioner committed any act prior to September 1, 1991. By failing to prove that an element of the offense was committed prior to that date, the State failed to show that the 1973 Penal Code remained in effect as applied to Petitioner.

Therefore, Petitioner was convicted of violating a law which had been repealed and which the State failed to prove remained in effect based on the savings clauses in the 1991 and 1993 statutes. The indictment on its face alleged a violation of the 1991 version of the 1973 Penal Code. The instructions submitted to the jury at guilt / innocence (and the punishment charge later submitted to the jury) alleged a violation of the 1994 Penal Code.[4]

In sum, the highest Texas Court, the Court of Criminal Appeals, held in *Dickens* that the 1973 Penal Code is applicable if any element of the offense in the indictment occurred before September 1, 1994. The indictment presented by the State and upon which it tried its case, met the *Dickens* requirement and thereby alleged a violation of the 1973 Penal Code. However, when the State "excised" the 1991 allegations, it no longer charged a violation of the 1973 Penal Code but rather a violation of the 1994 Penal Code.

The only issue before this Court is whether, as a matter of federal law, a person may be convicted of violating a repealed statute even if that repealed statute has been replaced by a later legislative enactment. Petitioner asserts that this is an important matter of federal constitutional and that due process prohibits a conviction for violating a statute which is not in effect at the time of the allegations which are submitted to the jury.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, vacate the

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[4] Because the punishment range submitted to the jury was greater that that authorized by the 1991 version of the 1973 Penal Code, the result also was an increase in punishment after the acts alleged in the indictment occurred. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789)

judgment of the Court of Appeals and remand for further consideration.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

HECTOR A. CUELLAR, "AKA" FRED CUELLAR, Appellant v. THE STATE OF TEXAS, Appellee

NO. 01-98-00572-CR

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

1999 Tex. App. LEXIS 6690

September 2, 1999, Opinion Issued

NOTICE [*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT

SUBSEQUENT HISTORY: Appellant's Petition for Discretionary Review Refused April 26, 2000.

PRIOR HISTORY: On Appeal from the 338th District Court, Harris County, Texas, Trial Court Cause No. 743694

DISPOSITION: Affirmed.

CORE TERMS: appropriation, diamond, theft, investors, carat, extraneous, felony, royal, complain, probative value, pet, restitution, mistrial, material issue, degree felony, second degree, overrule, legal sufficiency, occurring, fine, relevant evidence, fact finder, classification, inadmissible, prejudicial, remoteness, legally insufficient, closing arguments, down payment, indictment

JUDGES: Panel consists of Chief Justice Schneider and Justices Hedges and Andell.

OPINION BY: ERIC ANDELL
OPINION:
OPINION:

A jury found appellant guilty of felony theft in an amount over $200,000, and assessed punishment at 10 years community supervision and a $10,000 fine. Appellant was also ordered to pay $1,075,100 in restitution to the complainants. In four points of error, appellant complains of: (1) the legal sufficiency of the evidence; (2) the denial of his motion for mistrial; (3) improper closing arguments; and (4) the sufficiency of evidence supporting imposition of restitution. We affirm.

FACTS

Appellant, the owner of Diamond Cutters International ("DCI"), sold a watch to Michael McDonald. McDonald, an investment banker, returned to DCI with a friend whose mother sought an investment grade diamond. Shortly thereafter, appellant called McDonald and inquired whether he knew anyone interested in buying large diamonds. Appellant [*2] told McDonald about a 50.5 carat diamond owned by the Saudi Royal family. Appellant explained that the purchase price was $4,000,000, and they could auction the diamond for $9,000,000 to $12,000,000. Appellant told McDonald the down payment on the diamond was $1,000,000. To cover the down payment, appellant asked McDonald to raise $100,000, and appellant would contribute $700,000 and borrow $200,000. After McDonald paid appellant $100,000, appellant told McDonald that if they could sell the 50.5 carat diamond and a 88.9 carat diamond, they could purchase some loose diamonds at wholesale.

Appellant told McDonald they would profit greatly from the sale of the loose diamonds.

McDonald invested more of his own money and found investors to do the same. In all, McDonald gave appellant over $1,000,000 through checks disbursed from his personal account and Evergreen Consulting, McDonald's business account. Eventually, it was revealed that the diamonds were not owned by the Saudi Royal family, McDonald and the other investors' monies were not used to purchase the 50.5 carat diamond, and appellant would not return their money.

LEGAL SUFFICIENCY

In point of error one, appellant [*3] contends the evidence is legally insufficient to sustain his conviction.

The standard for reviewing the legal sufficiency of evidence to support a conviction is whether, after reviewing the evidence in a light most favorable to the verdict, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Banda v. State*, 890 S.W.2d 42, 50 (TEX.CRIM.APP.1994).

Appellant was charged with felony theft pursuant to TEX. PENAL CODE ANN. §§ 31.03 & 31.09 (Vernon 1973), Section 31.03, in part, provides that a person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property. Id. at § at 31.03(a). It also provides that an appropriation of property is unlawful if it is without the owner's effective consent. Id. at § 31.03(b)(1). Theft of property with a value of $200,000 or more is a first degree felony. Id. at § 31.02(e)(7). Section 31.09 provides that when amounts are obtained pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered

as one offense and the amounts aggregated in determining the grade of the [*4] offense. Id. at § 31.09.

The indictment included 10 appropriations for thefts occurring in 1991, and 104 appropriations for thefts occurring in 1995, n1 At the conclusion of the evidence, appellant argued that the 1991 appropriations should be omitted because the State did not present any evidence of their commission. The State then dropped every 1991 appropriation and eight of the 1995 appropriations.

n1 The 1991 and 1995 thefts were not part of the same investment deal and involved a separate group of investors. The 1991 investors obtained a civil judgment against appellant in 1994.

Appellant contends the evidence was rendered legally insufficient because the indictment alleged a violation of the 1973 theft statute, which was in effect at the time appellant committed the 1991 theft appropriations. At the time appellant committed the 1991 appropriations, the classification of theft in an amount over $20,000, was a second degree felony. Effective September 1, 1991, the legislature increased the classification [*5] of theft in an amount over $200,000, to a first degree felony. While the legislature changed the classification, it did not change the elements of felony theft. Appellant contends that because the 1991 appropriations constituted a second degree felony, and the 1995 appropriations constituted a first degree felony, the evidence was rendered legally insufficient as a result. In support, appellant cites *Dickens v. State*, 981 S.W.2d 186, 187 (*Tex. Crim. App. 1998*). In Dickens, the appellant pleaded to guilty to felony theft, and the trial court sentenced her to 20 years confinement. Id. On appeal, Dickens complained the trial court denied her due process of law by sentencing her outside the range of punishment prescribed by

law. Id. Some of Dickens's thefts were committed when the maximum punishment was 20 years confinement, and some were committed after the new statute went into effect and reduced the maximum punishment to 10 years. *Id.* at 188. The Court concluded that the earlier statute applied, as did the corresponding higher punishment range. Id. The Court relied on a savings clause in the earlier statute, which required the earlier [*6] punishment range to apply when any element of the theft was committed before the effective date of the new statute. Id.

We find appellant's reliance on Dickens misplaced. Here, appellant does not complain that he was sentenced outside the statutory punishment. n2 Appellant instead complains that the evidence was insufficient. The legislature did not change the elements of theft statute, only the degree of punishment. In a legal sufficiency challenge, we review the record to determine whether a rational fact finder could have found appellant guilty based on proof of the elements of the offense. Therefore, Dickens does not apply to this case. Appellant has not shown that the change in the degree of felony theft affected the sufficiency of the evidence in his case.

n2 The punishment for a first degree felony ranges from five to 99 years imprisonment and a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.32 (Vernon 1994). The punishment for a second degree felony ranges from two to 20 year imprisonment and a fine not to exceed $10,000. TEX PENAL CODE ANN. § 12.33 (Vernon 1994). Appellant's punishment was assessed at 10 years community supervision and a $10,000 fine. Appellant's punishment was not outside the statutory punishment for a second degree felony, which applied to the 1973 theft statute.

[*7]

At appellant's trial, the jury heard the following testimony:

1. Michael McDonald testified he personally invested $140,000 with appellant and has not received any money in return. Appellant told Michael and other investors that DCI's diamond inventory would be liquidated if the large diamond deal failed.

2. Richard McDonald, a retired engineer for the Texas Highway Department, testified he invested $115,000 with appellant and has not received anything in return. Appellant told Richard that he was wiring $1,000,000 to the Saudi Royal family as a down payment on a 51.5 carat diamond the Saudi Royal family was selling.

3. Doug Moore, a jeweler, testified he never received a return on his $32,000 investment despite the fact he was promised a 500 percent return. Appellant showed Moore some loose diamonds and promised liquidation if the 51.5 carat diamond deal was unsuccessful. Appellant told Moore the Saudis were selling the 51.5 carat diamond.

4. Barry Berg of the William Goldberg Diamond Incorporated ("WGDI") testified appellant never owned or sold a 51 carat diamond. Appellant told potential clients that certain enormous diamonds belonged to the royal Saudi [*8] Royal family, although these statements were untrue.

Based on the above testimony, we conclude that a rational fact finder could have found appellant guilty. *Eastep v. State*, 941 S.W.2d 130, 135 (*Tex. Crim. App. 1997*) (finding the evidence sufficient when the State shows appellant illegally appropriated enough property to meet the

aggregated value alleged). We overrule point of error one.

MISTRIAL

In point of error two, appellant complains trial court erred by refusing to grant a mistrial after the State abandoned appellant's 1991 theft appropriations.

The denial of a motion for mistrial is within the sound discretion of the trial court, and reversal of a judgment is justified only if the trial court abused its discretion. *Ex parte Hernandez, 906 S.W.2d 931, 932 (Tex. Crim. App. 1995).*

The indictment charged appellant with 10 theft appropriations occurring during 1991 and 104 theft appropriations occurring during 1995. At the conclusion of the evidence, appellant moved for a directed verdict on the basis that the 1991 appropriations should be omitted because the State did not present any evidence of their commission. The trial court [*9] denied appellant's motion. The State then dropped all 1991 appropriations and eight of the 1995 appropriations. In response, appellant moved for mistrial on the basis that the State included the 1991 appropriations only to prejudice appellant. The trial court denied the motion.

The appellant contends the State waited to abandon the 1991 appropriations because the 1991 appropriations were inadmissible due to their remoteness in time. Extraneous offenses are inadmissible unless the purpose for admission falls within a few recognized exceptions which are enumerated under TEX. R. EVID. 404(b). *Williams v. State, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983); Bevers v. State, 811 S.W.2d 657, 661* (Tex. App. --Fort Worth 1991, pet ref'd); *Bryant v. State, 636 S.W.2d 513, 515.* Evidence of other crimes is not admissible to prove the defendant is a criminal generally. *Wintters v. State, 616*

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S.W.2d 197, 200; Chavez v. State, 794 S.W.2d 910, 913 (Tex. App.-- Houston [1st Dist.] 1990, pet ref'd). However, under rule 404(b), evidence of other crimes or acts may be admissible is it has relevance to a material issue in the case apart from [*10] its tendency to prove the character of the defendant. *Montgomery v. State 810 S.W.2d 372, 377 (Tex. Crim. App. 1991); Wiliams, 662 S.W.2d at 346;* TEX R. CRIM EVID. 404(b). Permissible purposes for which evidence of other crimes, wrongs, or acts may be admitted include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Montgomery, 810 S.W.2d at 377.*

The factors of remoteness and similarity of an extraneous offense are important, not in and of themselves, but only as they bear on the relevancy and probative value of the offered evidence of extraneous offenses. *Plante v. State, 692 S.W.2d 487, 491 (Tex. Crim. App. 1985).* In other words, remoteness does not per se render an extraneous offense irrelevant. *Linder v. State 828 S.W.2d 290. 292* (Tex. App.--Houston [1st Dist.] 1992 pet ref'd.)

Here, the 1991 appropriations that the State abandoned involved investors paying appellant money to invest in Saudi diamonds and never receiving a return. Because appellant's intent in the 1991 deal was a material issue as to appellant's intent [*11] in the 1995 deal, we believe the 1991 appropriations were relevant.

Having found the evidence relevant, we must address whether the admission of the 1991 appropriations was more prejudicial than probative. Before admitting relevant evidence of an extraneous offense, the trial court should determine that the probative value of the evidence substantially outweighs the danger of unfair prejudice. TEX. R. EVID. 403. The approach under rule 403 is to admit all

relevant evidence unless the probative value of that relevant evidence is substantially outweighed by the danger of unfair prejudice to a defendant. *Montgomery, 810 S.W.2d at 377.* Each case must be considered on its own facts and circumstances, and, absent a clear abuse of discretion, the trial judges decision should not be disturbed on appeal. *Crank v. State, 761 S.W.2d 328, 342 n.5 (Tex. Crim. App. 1998); Cantrell v. State, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987); Templin v. State, 711 S.W.2d 30, 33 (Tex. Crim. App. 1986).*

In Linder, this Court held that a seven year gap between an extraneous offense of burglary/sexual assault and the charged offense of [*12) sexual assault did not render the extraneous offense inadmissible. *Linder, 828 S.W.2d at 292.* First, we determined that the extraneous offense was relevant. Then, we found that because the identity of the appellant was a material issue in the case, the probative value of the extraneous offense outweighed its prejudicial value.

In this case, appellant's intent is a material issue. The 1991 deal involved investors paying appellant money to purchase Saudi diamonds, and appellant refusing to return any money until they sued appellant. The 1995 deal also involved appellant's convincing investors to invest in Saudi diamonds and then refusing to return any money. The prejudicial value of the 1991 appropriations is outweighed by the probative value of appellant's intent in refusing to return any of the investors' monies. Because we believe the 1991 appropriations would have been admissible anyway, we do not find the trial court abused its discretion in denying appellant's motion for mistrial. We overrule point of error two.

CLOSING ARGUMENTS

In point of error three, appellant complains the trial court erred in overruling his objection to the State's closing [*13] argument at the guilt/innocence phase. Specifically, appellant contends the State's argument that appellant has a reputation as a liar and a thief was improper because no reputation evidence was presented. During closing arguments, the State argued:

[State]: You might say why can't somebody do something about the crime? Well, folks, there's more crime in this community than just somebody going out there with a gun or a knife. There's people like Fred Cuellar, a businessman. Going to offer some investment opportunity, help you out, make you rich. What does he do? He steals your money. And he lies to steal your money. This press release of April 1995, in the first paragraph at the bottom it says -- and I'm taking it just out of context here for a minute. In an industry where dealers' representations are determined by the measure of their transactions. Well his reputation is that he is a liar and a thief.

[Appellant]: Your Honor, I'm going to object. That's outside the record and an improper statement.

[Court]: Overruled.

The scope of proper jury argument is (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to the argument of counsel, and [*14] (4) plea for law enforcement. *Whiting v. State, 797 S.W.2d 45, 47 (Tex. Crim. App. 1990)*.

Appellant was on trial for theft, and six complainants testified appellant lost their entire investment by deceiving them. Appellant paid to have a press release distributed claiming he sold a 51.5 carat diamond. Berg testified

appellant never owned or sold a 51.5 carat diamond, despite appellant's claims to the contrary. Appellant also told potential clients that certain enormous diamonds belonged to the Saudi Royal family, although these statements were false. Finally, while appellant told investors he had wired $2,800,00 to the Saudis as part of their investment deal, David Pilant, a fraud examiner for the District Attorney's office, testified appellant had only wire transferred $25,000 and to WGDI, not the Saudis.

In light of the evidence before the jury, we conclude that the State's argument that appellant has a reputation and a liar and a thief was a reasonable deduction or summation of the evidence. We overrule point of error three.

RESTITUTION

In point of error four, appellant complains the evidence was insufficient to support the trial court's order of [*15] restitution because the State did not present evidence of 77 appropriations totaling $652,000.

The trial court has the discretion to order restitution. *Cartwright v. State, 605 S.W.2d 287, 289 (Tex Crim. App. 1980)*. However, when a court decides to order restitution, due process considerations require the amount ordered to be "just," that is, the amount must have a factual basis in the record. *Cartwright, 605 S.W.2d at 289*. That amount must also be within the parameters of the verdict. *Hefner v. State, 735 S.W.2d 608, 614 (Tex. App.--Dallas 1987, pet. ref'd)*.

Pilant, a fraud and financial analyst for the District Attorney's office, testified he reviewed the bank records for DCI, Evergreen Consulting, and Michael McDonald. The records showed appellant's company, DCI, received $1,075,100 from victims and returned none. Michael

McDonald's testimony included the names and amounts of every complainant who invested money with appellant. McDonald testified no returns were made on those investments. Five other complainants testified they had invested money with appellant and had not received a return.

During the punishment phase, the [*16] judge asked appellant if he was willing to pay in excess of a million dollars in restitution. Appellant testified: "I feel I should pay restitution to all the people who say they met me because I'll take their word on it, because I don't remember. But if the jury decides that I should pay restitution to anybody else, I'll respect their decision." The jury ordered restitution.

We conclude the trial court's restitution order satisfied the due process requirements based on the factual basis in the record. *Green v. State, 880 S.W.2d 797, 802* (Tex. App.--Houston [1st Dist] 1994, no pet).

We overrule point of error four and affirm the trial court's judgment.

Eric Andell

Justice

Panel consists of Chief Justice Schneider and Justices Hedges and Andell.